

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WALTER L. CUMMINGS and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 97-2005; Submitted on the Record;
Issued June 1, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 41-year-old machinery repairman, filed a (Form CA-2) claim for benefits on October 30, 1991, alleging that his exposure to toxic elements at the employing establishment aggravated a preexisting allergy and caused a dormant dermatitis infection to become symptomatic. The Office accepted appellant's claim for aggravation of dermatitis. Appellant subsequently filed several additional claims; in one of these claims, appellant alleged that he contracted a stress-related disorder due to his employment-related exposure and to an alleged incident in which appellant's supervisor made derogatory comments towards him.

By decision dated June 12, 1995, the Office denied appellant's claim for benefits based on emotional stress, finding that he failed to establish any specific factors or incidents of employment which may have caused or aggravated a stress-related condition.¹

By an undated letter from appellant, which the Office did not receive until May 6, 1997, appellant requested reconsideration.

By decision dated May 6, 1997, the Office denied appellant's request for reconsideration, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that although it did not retain the envelope showing the postmark date and appellant's letter was undated, appellant did include a letter from the employing establishment dated January 23, 1997, which clearly established that his request for reconsideration could not have been mailed prior to that date, which is more than one year after the Office's previous merit decision in this case. The Office therefore denied appellant's

¹ The Office stated that appellant had been totally disabled from December 1991 through December 29, 1992, the period for which he sought compensation, but found that this disability was not causally related to factors of his federal employment.

request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As the record indicates that appellant filed his appeal with the Board on May 20, 1997, the only decision properly before the Board is the May 6, 1997 Office decision.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle an employee to a review of an Office decision as a matter of right.⁴ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁵ As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁷ This

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2)

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, a claimant may obtain review of the merits of his claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.138(b).

⁶ *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant had a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous); Federal (FECA) Procedure Manual, Chapter 2.1602, paragraph 3(b) (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows “clear evidence of error” on the part of the Office).

⁷ See cases cited *supra* note 3.

regulation, however, does not specify when an application is “filed” for the purpose of determining timeliness. The Office has therefore administratively decided that the test used in 20 C.F.R. § 10.131(a) for determining the timeliness of a hearing request should apply to applications for review.⁸ Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used.⁹

In the instant case, the Office failed to make as part of the record the envelope in which appellant’s request for reconsideration was received and appellant’s letter requesting reconsideration is undated. The Office, however, properly found that appellant attached a letter from the employing establishment to his request, dated January 23, 1997, which constitutes probative evidence that his request was not mailed prior to that date. The date of this letter, January 23, 1997, is more than one year after June 12, 1995, the date the Office issued its last merit decision in this case. Thus, the Office properly determined in this case that appellant’s application for review is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ Office procedures state that the Office will reopen appellant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if appellant’s application for review shows “clear evidence of error” on the part of the Office.¹¹

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁶ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant

⁸ Federal (FECA) Procedure Manual, Chapter 2.1602, paragraph 3(a) (January 1990).

⁹ *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); *see Lee F. Barrett*, 40 ECAB 892 (1989).

¹⁰ *Rex L. Weaver*, 44 ECAB (1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, *supra* note 4.

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.¹⁷ The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the fact of such evidence.¹⁸

In the instant case, appellant's request for reconsideration fails to establish clear evidence of error with regard to the Office's finding in its June 12, 1995 decision that he failed to submit sufficient medical evidence establishing that his stress-related condition was caused by factors of employment. Appellant did not submit any additional medical evidence with his request; he merely contended he was entitled to back pay from December 20, 1991 through December 29, 1992 because he had received retirement disability from the employing establishment due to his depression. This unsupported contention by appellant fails to establish clear evidence of error with respect to the Office's June 12, 1995 decision.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant's request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated May 6, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 1, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁷ *Leon D. Faidley, Jr.*, *supra* note 4.

¹⁸ *Gregory Griffin*, 41 ECAB 458 (1990).